No. 94-1507

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In The

Supreme Court of the United States

October Term, 1994

AEROLINEAS ARGENTINAS S.A.,

Petitioner,

vs.

MARO LEATHER CO.,

Respondent.

On Petition for Writ of Certiorari to the Appellate Term, First Department of the Supreme Court of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to issue a Writ of *Certiorari*?

2. Is there a conflict among the courts of New York State, the United States Court of Appeals for the Second Circuit, and other federal courts with regard to the issue of Notice of Claim, which conflict would justify the grant of *Certiorari* by this Court?

3. Should the Court in its discretion revisit for a third time the question of awarding pre-judgment interest under the Warsaw Convention?

PARTIES TO THE PROCEEDINGS

Respondent acknowledges that the list of parties submitted by Petitioner is accurate.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions below are accurately described in the Petition and copies thereof are accurately reproduced in Petitioner's appendices. We note, however, that Respondent contends, contrary to Petitioner, that there is no basis for this Court to assume jurisdiction because Respondent has not exhausted all of its state court remedies.

STATUTORY PROVISIONS INVOLVED AND NOT CITED OR QUOTED BY PETITIONER

28 U.S.C. § 1257 State courts; certiorari

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CPLR § 5501. Scope of review.

> (a) Generally, from final judgment. An appeal from a final judgment brings up for review:
>
> 1. any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken. . . .

CPLR § 5514. Extension of time to take appeal or to move for permission to appeal

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

CPLR § 5601. Appeals to the court of appeals as of right.

(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and. . . .

CPLR § 5602. Appeals to the court of appeals by permission.

* * *

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

STATEMENT OF THE CASE

Respondent accepts as substantially accurate the statement of facts as recited by Petitioner. In stating what steps were taken with regard to the proceedings below, however, Petitioner has obviously not recited what it did not do, but could have done, after the appeal was dismissed by the Court of Appeals: it could have sought permission from the Appellate Division to appeal to the Court of Appeals.

We note one major inaccuracy, as well, concerning the decision of the trial judge herein. At pages twelve and thirteen, Petitioner states that the trial judge imposed interest under the mandatory provisions of CPLR § 5001, and made no finding as allegedly required by *Domanique v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), "to support the court's exercise of discretion". Reference to the decision below (A6-A11 of the Petition) fails to support Petitioner's contention that the award of interest was considered by the court to be mandatory. Indeed, the trial judge found "that if any case cries out for the award of interest and the notion that a defendant should not be able to hide behind The Convention to defend the lawsuit so that recovery is totally negated, this is it." (A-8 of Petition).

SUMMARY OF ARGUMENT

The Petition should be dismissed because this Court lacks subject matter jurisdiction under 28 U.S.C. § 1257. Petitioner failed to exhaust all of its state court remedies by failing to seek

leave to the Court of Appeals from the Appellate Division, First Department.

Alternatively, the Petition should be denied because there is no conflict between the state and federal courts on the issue of notice of claim, and this Court has twice left standing the award of pre-judgment interest by lower courts.

REASONS FOR DISMISSING OR DENYING THE WRIT

I.

THE PETITION FOR A WRIT OF *CERTIORARI* SHOULD BE DISMISSED BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION.

In seeking *certiorari* Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. The statute provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . .

Petitioner seeks review of a final order of the Appellate Term of the New York Supreme Court, First Department, dated July 19, 1994, and a prior non-final decision of the Appellate Division, First Department in the same case, entered December 20, 1988. Inasmuch as these are not the highest courts of New York in which a decision could have been had, review by the Supreme Court is precluded.

After the final decision of the Civil Court was affirmed by the Appellate Term, Petitioner sought leave to appeal to the

Appellate Division, first from Appellate Term, and then from the Appellate Division itself. Both of these motions were denied. Petitioner then sought to invoke the mandatory jurisdiction of the Court of Appeals, the highest court of the State of New York pursuant to CPLR § 5601(b)(1). The Court of Appeals dismissed the appeal *sua sponte* (after counsel for Respondent wrote a letter challenging jurisdiction), on the ground that mandatory jurisdiction did not lie under CPLR § 5601(b)(1).

What Petitioner did not do but could have done, was to seek permission to appeal pursuant to CPLR § 5602(b)(2)(i). This section states, in pertinent part:

> An appeal may be taken to the court of appeals by permission of the appellate division:
>
> * * *
>
> 2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency. . .[1]
>
> * * *
>
> (i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601. . . .

As noted above, it was under CPLR § 5601(b) that Petitioner

1. This action originated in the Civil Court of the City of New York.

sought to invoke the mandatory jurisdiction of the Court of Appeals, which permits review of Appellate Division orders which finally determine an action and which directly involve the construction of the Constitution of the United States. Although the Appellate Division's order finally determined the action, mandatory jurisdiction did not lie because what was directly involved was not the construction of the Constitution of the United States, but rather the terms of the Warsaw Convention. Under New York's statutory scheme for mandatory jurisdiction the Petitioner could not take an appeal as of right.

Nevertheless, Petitioner could have had its appeal heard by the Court of Appeals, by seeking permission from the Appellate Division under CPLR § 5602(b)(2)(i), to appeal to the Court of Appeals from the same Appellate Division order which it sought to appeal as of right. Grounds for seeking leave to appeal to the Court of Appeals existed. The Appellate Division's order finally determined the action; the action originated in the Civil Court (which is not one of the courts excluded in paragraph 2 of CPLR § 5602(b)(2)); and the action was not appealable as of right pursuant to CPLR § 5601(b)(1).

Even though the appeal as of right was dismissed, Petitioner still had time to move for leave to appeal. Under CPLR § 5514(a), when an appeal taken as of right is dismissed, and an alternate method for taking an appeal exists, such as by moving for permission to appeal, the time for moving for permission (30 days) runs from the date of dismissal of the appeal. Thus, Petitioner was not precluded by time from seeking permission.

Additionally, even though Petitioner had sought leave to appeal in 1988 from the Appellate Division's non-final order, (which only dealt with the issue of notice of claim), this order could have been reviewed by the Court of Appeals if leave was granted from the Appellate Division order which finally

determined the action. Under CPLR § 5501(a) the prior order could be reviewed because an appeal from final judgment brings up for review "any non-final judgment or order which necessarily affects the final judgment . . ."

Merely because the Court of Appeals dismissed the appeal taken as of right does not mean that the highest court of the state "rendered" a decision providing subject matter jurisdiction under 28 U.S.C. § 1257. In *Gotthilf v. Sills*, 375 U.S. 79, 84 S. Ct. 187, 11 L. Ed. 2d 159 (1963), this Court addressed a somewhat similar set of circumstances, and, over an earnest dissent by Justice Douglas, dismissed a writ of *certiorari*.

In the *Gotthilf* case, which arose in New York, the Petitioner had filed a motion for leave to appeal to the Court of Appeals from an Appellate Division, First Department ruling. The appeal was dismissed because the Appellate Division order was not final, and thus leave could not be sought from the Court of Appeals. Petitioner then filed a notice of appeal, but the appeal was dismissed because there was no grounds for mandatory jurisdiction. *Certiorari* was sought and granted. However, upon its review of the appeal itself, the Supreme Court found that despite the two dismissals in the Court of Appeals, the "judgment of the Appellate Division" is not that of the "highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. § 1257 (375 U.S. at 80, 84 S. Ct. at __, 11 L. Ed. 2d at 161). The court noted that the Petitioner could have sought leave from the Appellate Division to proceed to the Court of Appeals, and did not. Thus, it found that *certiorari* was erroneously granted.[2]

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2. That defendant sought leave to appeal from the decision of the Appellate Division in 1989 is irrelevant. The only issue before the Appellate Division was the timeliness of the notice of claim. The issues regarding pre-judgment interest had not arisen. Both issues could have been addressed if the Court of Appeals heard the appeal from the July 19, 1994 order since under

(Cont'd)

Likewise, in this case, although the Court of Appeals dismissed the appeal taken as of right, Petitioner still could have sought leave to appeal from the Appellate Division, as the Petitioner in *Gotthilf* could have done. Since it did not, the writ for *certiorari* must be dismissed. As was stated in *Gorman v. Washington University*, 316 U.S. 98, 100-101, 62 S. Ct. 962, 86 L. Ed. 1300 (1942):

> It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari *until the possibilities afforded by the state procedure for its review by all state tribunals have been exhausted.*

(Emphasis supplied).

Petitioner has not exhausted all of its state court remedies. Since it has not, the Supreme Court does not have subject matter jurisdiction to entertain the appeal, and the writ of *certiorari* should be dismissed.

II.

THERE IS NO CONFLICT IN FEDERAL LAW CONCERNING THE PERIOD IN WHICH A NOTICE OF CLAIM SHOULD BE FILED.

The essence of Petitioner's argument at pages 13 through 19 of its brief is that there is conflicting law as to whether the loss of

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(Cont'd)

CPLR § 5501(a)(1), as noted above, an appeal to the Court of Appeals would have also brought up for review any non-final order such as the earlier order dealing with notice of claim questions.

discrete packages from a larger shipment, as opposed to loss from within a particular package, constitutes a "partial loss" or a "loss". If the loss of discrete packages constitutes a partial loss then the seven day notice provision of Article 26 of the Warsaw Convention applies. If the loss of discrete packages is found to be merely "loss" then the Warsaw Convention itself does not require any notice. Carriers' airway bills and tariffs, including Petitioner's herein, would, under this circumstance, require written notice within 120 days.

The fallacy in Petitioner's argument is that there is no conflict in federal or state law.

Any discussion of notice of claim in a partial loss situation begins with an analysis of *Fothergill v. Monarch Airlines, Ltd.*, [1981] A.C. 251 (H.L. 1980). When Mr. Fothergill arrived at destination his suitcase was delivered to him. He noticed that the suitcase itself was ripped and promptly (within 7 days) presented notice of claim to the carrier concerning the damage to the suitcase. He thereafter discovered that certain of his belongings were missing from the suitcase. However, he did not make further timely (*viz.*, within seven days) claim to the carrier. The court ultimately held that pilferage from within the delivered suitcase was damage within the meaning of Article 26(2) of the Warsaw Convention, and thus the claim for the missing items would fail due to the absence of a timely claim.

Many cases have discussed *Fothergill* and, as in, for example, *Denby v. Seaboard World Airlines, Inc.*, 575 F. Supp. 1134 (E.D.N.Y. 1983); *rev'd*, 73 F.2d 172 (2nd Cir. 1984) discussed below, it has always been understood that had Mr. Fothergill taken three suitcases with him on the fateful day, and only two of them were delivered, the total non-delivery of the one suitcase would not be "damage" and thus would not require a seven day notice of claim. We note that at page 14 of its brief,

Petitioner argues that the rule is otherwise in the United Kingdom now due to some domestic legislation there which expanded and altered the holding of *Fothergill*. While this may well be, it does not have an impact on the proper interpretation of the Warsaw Convention in this country, or otherwise.

The leading case in this county is *Denby v. Seaboard World Airlines, Inc., supra*. The Second Circuit observed that the loss of discrete packages within a larger shipment would not require notice within seven days as required by Article 26(2) (*id.* at p. 179). The Court also stated that if the cartons were missing from one container carrying all the cartons that were shipped, then notice should be given within seven days; presumably so that the airlines could immediately be put on notice of the particular loss of goods shipped in a container. Where packages were shipped separately, however, and some of them are not delivered, such a loss is not partial and the immediate notice requirements of Article 26(2) are not essential to putting the airline on notice of the loss.

There is no countervailing language or holding in any federal case. Indeed, there does not appear to be any federal case directly on point. None of the cases cited by plaintiff contradict *Denby*. In *St. Paul Insurance Co. of Illinois*, 807 F.2d 1543 (11th Cir. 1987) for instance, the court held that contract of carriage included the carrier's duly filed tariff, but noted in *dicta* that it approved of the distinction enunciated in *Denby* between damage and loss. (*Id.* at 1549).

In *Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp.*, 739 F.2d 536 (11th Cir. 1984), the court held that seven day notice provisions apply even where cargo is significantly damaged because the air carrier is not on actual notice of the damage. Obviously, in *Denby*, the carrier was well aware of the non-delivery of certain containers.

The interpretation of Article 26 and the relevant carrier's air bills and tariff provisions, as established by the highest court in New York State to consider the issue, is the decision of the Supreme Court, Appellate Division, First Department herein (*see* pages A-21 through A-28 of Petitioner's appendices). The result reached is completely in accord with the *Denby* decision and indeed Justice Asch, writing for the court, specifically made reference to Judge Weinstein's "scholarly decision" in *Denby*. Justice Asch also agreed with Judge Friendly of the Second Circuit in "yet another scholarly opinion". Accordingly, the decisions on the issue of notice of claim in a partial loss situation are in accord in both the various United States Court of Appeals, as well as New York State.

Indeed, the only "conflict" shown in Petitioner's brief is in *Affretair (Compagnie Gabonaise d'Affretement Aerien) v. VOB*, RW 1982, 50 (HR 1982) *reprinted in* 7 J. Air L. 173 (1982).

As noted by Judge Weinstein in *Denby*, and as quoted in the Appellate Division's decision herein, the *Affretair* case has been "cogently criticized" for extending "damage" to any kind of shortage including a shortage of one out of 10 pieces shipped. Such a decision, which has been noted, and yet not followed by any federal court or New York State court, is not sufficient to constitute a "conflict between the Circuits" so as to suggest the need for *certiorari*.

The case law in the United States is consistent, and thus *certiorari* should be denied on this issue.

III.

INASMUCH AS THE ISSUE HAS BEEN BEFORE THIS COURT TWICE PREVIOUSLY THERE IS NO REASON TO GRANT *CERTIORARI* ON THE ISSUE OF PRE-JUDGMENT INTEREST.

The issue of whether pre-judgment interest in excess of the limitations of the Warsaw Convention should be awarded has twice previously been before this Court, and both decisions have left intact lower court decisions which upheld pre-judgment interest. Under such circumstances, the issue need not be revisited at this juncture.

In *Eastern Airlines, Inc. v. Mahfoud*, 474 U.S. 213, 106 S. Ct. 586, 88 L. Ed. 2d 522 (1985) the Court affirmed by an equally divided court a Fifth Circuit decision which had awarded pre-judgment interest under the Warsaw Convention. 729 F.2d 777 (5th Cir. 1984), *mem. aff'g*, 17 AV CAS (CCH) 17, 714 (W.D. La. 1982).

Eleven years later the Court has not reversed itself; and, eleven years after the institution of suit herein, Petitioner is still resisting the day of judgment.

In the same year that *Mahfoud* was affirmed, the Court also denied *certiorari*[3] in a cargo case similar to this matter, where pre-judgment interest was awarded in excess of the weight limitation of the Convention. *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir.), *cert. denied*, 469 U.S. 1186, 105 S. Ct. 951, 83 L. Ed. 2d 959 (1985). The anticipated argument by Petitioner that

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3. It is somewhat ironic that the year the Supreme Court denied *certiorari* — 1985, was the same year suit was instituted in this matter.

certiorari in *Boehringer* was denied because *Mahfoud* was already pending is rebuttable because *Mahfoud* was a personal injury case and *Boehringer* a property damage case. It is quite possible that these two types of cases could be treated differently, inasmuch as many jurisdictions permit pre-judgment interest for property damage cases while not for personal injury (New York, for instance).

While we recognize the limited precedential value of a denial of *certiorari*, the point remains that on the two occasions where the issue has come before the Supreme Court, the Court has left standing lower court decisions which awarded pre-judgment interest. If *certiorari* is denied here, Petitioner's arguments concerning confusion in the federal Circuits would be put to rest. The legal equivalent of "three strikes and you're out" would make it clear to all practitioners that pre-judgment interest could be awarded under the circumstances presented.

CONCLUSION

Accordingly, for all of the foregoing reasons Petitioner's request for a writ of *certiorari* should be dismissed, or in the alternative, should be denied.

Respectfully submitted,

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